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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 1406

CHARLES ALLAN BEECH,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. _____

CHARLES ALLAN BROOM,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Charles Allan Broom prays that a writ of certiorari issue to review the judgment of The Court of Criminal Appeals of Texas entered in this cause on December 9, 1970.

CITATION TO OPINION BELOW

The opinion and judgment of The Court of Criminal Appeals of Texas is not yet reported and is printed in Appendix A hereto, infra, p. 1a.

JURISDICTION

The opinion and judgment of The Court of Criminal Appeals of Texas sought to be reviewed was delivered December 9, 1970. Timely Motion for Rehearing was thereafter overruled without written opinion January 27, 1971. February 1, 1971, the court stayed its mai late for a period of thirty days to permit filing of this Petition.

Jurisdiction to review the opinion and judgment of The Court of Criminal Appeals of Texas by writ of certiorari is invoked pursuant to 28 U.S.C. Sec. 1257(3).

How Federal Questions Were Raised
\t Examining Trial

At the close of testimony presented by the State at an examining trial before indictment (a transcript of that proceeding is in the record as State's Ex. 1) a motion to bind Broom over to the grand jury was opposed by his counsel because:

> "No cause at all. If anybody dressed like a hippie can be accosted that way and handled – if they can, then anybody can. That's not proper cause."

Professing to agree, the magistrate nevertheless refused to discharge Broom and ordered him bound over (State's Ex. 1, p. 52).

By Pretrial Motions

After indictment but before trial Broom filed and presented his Motion to Quash Indictment, paragraph 5 of which asserted:

> "The acts and conduct charged in the indictment do not constitute an offense against a valid law of the State of Texas for the reason that the prohibitions and penalties in the act with respect to private possession of Marijuana are based on a presumption of evil in mere possession and are, therefore, impermissible invasions of privacy guaranteed by the Constitution of the United States and the

> Constitution of Texas in the absence of a showing by the State of a compelling interest or reason to abridge such right."

The Motion to Quash Indictment was overruled in its entirety. Broom also filed and presented his Motion to Suppress evidence, asserting inter alia:

> "The search and seizure of the Defendant was without probable cause and without advance judicial approval through the warrant procedure, and the failure to comply with the warrant requirement is not excused under the facts and circumstances in this cause."

And also that the "intrusion upon the privacy of the Defendant's person (was) in violation of his rights under the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, made applicable to the State of Texas under the Fourteenth Amendment to the Constitution of the United States. . . ." The trial court, finding only that "the facts and the law are with the State," denied the motion by Order on Motion to Suppress.

By Objection During Trial

During the course of trial before the court, without aid of a jury, when a defense witness who was with Broom on the occasion in question was asked whether one of the officers removed an object from Broom, the following objection and coiliquy occurred:

> "MR. CLINTON: Excuse me, Your Honor. Right at this point I hope it is understood that all of the testimony about what was taken is subject to our motion to suppress, which the Court has overruled, and we make an objection at this time to any testimony about it on grounds that it was the product of an illegal search and seizure for all the reasons stated in the motion. . .
>
> THE COURT: Let the record show that you may have all of the objections stated for the reasons stated, as the Court does not want you to be denied any of your rights on appeal."

By Points on Appeal

Upon conviction, Motion for New Trial being neither required nor appropriate, Broom gave notice of and perfected his appeal. In Brief for Appellant filed in The Court of Criminal Appeals of Texas, the federal questions sought to be reviewed here were again raised in grounds of error presented and argued in the Brief, to-wit:

"GROUND OF ERROR ONE

> The trial court erred in denying Motion to Suppress Evidence and in admitting fruits of search of person of Appellant in evidence.

GROUND OF ERROR THREE

> The trial court erred in overruling the attack against the indictment made in paragraph 5 of Motion to Quash Indictment to the effect that prohibitions and penalties in Article 725b, V.A.P.C. with respect to private possession of marijuana are impermissible invasions of privacy in the absence of a showing by the state of the compelling interest or reason to abridge such right."

After The Court of Criminal Appeals of Texas overruled the above and other grounds of error (see Opinion, Appendix A, infra), Broom filed, presented and argued his Motion for Rehearing, attacking the original opinion of the appellate court and reurging federal constitutional questions sought to be reviewed. Rehearing was denied without written opinion.

QUESTIONS PRESENTED

1. Whether the warrantless search of a person preceding his arrest by an officer who is requested by a fellow officer, acting on an anonymous tip, to look for three "hippie type individuals" in a public park reported to have been smoking marijuana is "unreasonable" under the Fourth Amendment to the United States Constitution?

2. Whether the "regular police radio broadcast" theory may be applied to provide probable cause required by the Fourth Amendment to the United States Constitution for a warrantless search of a person preceding his arrest by an officer who is requested by a fellow officer, acting on an anonymous tip, to look for three "hippie type individuals" in a public park reported to have been smoking marijuana?

3. Whether prohibitions and penalties in Article 725b, Vernon's Annotated Penal Code of Texas, with respect to private possession of marijuana are impermissible invasions of right of privacy in the absence of a showing by the State of a compelling interest or reason to abridge that right.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Article 14.04, Code of Criminal Procedure of Texas, 1 Vernon's Ann. C.C.P. of Texas, p. 381, Article 14.04, provides:

> "When Felony Has Been Committed
>
> Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused."

3. Article 725b, Penal Code of Texas, 2 Vernon's Ann. P. C. of Texas, p. 76 and Cumulative Annual Pocket Part, p. 15 provides in pertinent part:

"[Sec. 2(a)] It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug.

Sec. 23(a) Except as provided in subsections (b) and (c) of this section, any person who violates any provision of this Act is guilty of a felony and upon a first conviction is punishable by imprisonment in the penitentiary for not less than two years nor more than life; . . ."

STATEMENT OF THE CASE

Charles Allan Broom is a resident citizen of Austin, Travis County, Texas; he has never been convicted of a felony. On the occasion in question, in the company of two other persons walking in a public park, Broom was accosted, seized, searched and arrested – in that order – by officers of Austin Police Department and charged with possession of marijuana. Pease Park is situated just west of a principal north-south thoroughfare in Austin, a creek winds through the park, alongside of which is a hike and bike trail, and on this particular afternoon several persons were enjoying the park.

At approximately 3:00 p.m. at the Police and Courts Building in downtown Austin Police Captain Sweeney told Sergeant Jerry Spain that he, the captain, "had received a call that there were three hippie-type individuals in Pease Park on the hike and bike trail across from Nob Hill Apartments that were smoking marijuana." The caller was anonymous and was in no way identified to Sergeant Spain; neither the sex nor description of the "hippie types" was stated nor did the caller indicate how he or she purported to know that what, if anything, was being smoked was in fact marijuana.

Contacting Sergeants Phillips and Llewellyn by radio, Sergeant Spain arranged to meet them at a certain parking lot just off Lamar Boulevard on 12th Street where Spain related to his fellow officers what the captain had reported to him

and no more. Spain then proceeded alone in his unmarked vehicle north on Lamar to the 2700 block entrance to Pease Park. On the way, looking over into the park, Spain saw what he described as three "hippie type" persons in the park: a boy and a girl sitting on the grass and a boy on his feet with "his arms extended and . . . turning around and moving from side to side." Spain did not see any one of the three smoking anything.

Meanwhile Phillips and Llewellyn, riding together, had turned off at 24th Street, parked their vehicle in an area just south of 24th and the hike and bike trail and left their unit.[1] Phillips and Llewellyn walked north on the hike and bike trail and observed ahead of them and walking toward them Broom and his companions and a small dog. Broom was just walking along and "was not doing anything unusual." Phillips and Llewellyn accosted the three persons, stopped them, identified themselves and showed badges. As Phillips, who dealt directly with Broom, told it:

> "I showed them my badge and I think I told them my name and we had information they were down there smoking marijuana and I was going to search them. And he asked me if I had a warrant and I told him we didn't need one."

Phillips proceeded to search Broom while Llewellyn searched his male companion. From the left front pants pocket Broom was wearing, Phillips extracted a "real small matchbox" – "smaller than a regular penny matchbox" – that contained an inch and a quarter or maybe an inch and a half cigarette butt, later found to weigh 0.45 grams.

The confrontation between Phillips and Llewellyn and the

[1] While Spain did not testify he did so, both Llewellyn and Phillips recall a radio communication from Spain before leaving their unit. Llewellyn stated that Spain reported only that "there were three people in the park, right at 24th Street that looked like maybe the people we were looking for," and was certain that Spain did not describe the people or what they were doing. Phillips stated that Spain reported that he had seen three persons on the grass and they "appeared to be under the influence" of something not specified.

three persons occurred and the search of Broom by Phillips was completed before Spain, who was walking south from the 2700 block, reached the point of confrontation. However, apparently it was Spain who took Broom into custody after the search and after the matchbox was found and informed Broom that he was under arrest, although Phillips claims the credit for having done so as well. Either way, it is clear that arrest followed search and its fruits.

When substantially these facts were developed at examining trial, counsel for Broom objected to his client being bound over to the grand jury on the grounds that probable cause had not been shown and after indictment continued to raise the federal questions sought to be reviewed here by motion to suppress, objection to evidence at trial and grounds of error on appeal; see pertinent quotations and excerpts under heading "How Federal Questions Were Raised," supra, pp. 2-4.

REASONS FOR ALLOWANCE OF WRIT

Sibron v. New York, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903 (1968) teaches:

> "The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries. Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so."

Thus the fundamental question raised here is whether when Officer Phillips accosted Broom, showed his badge, said he was going to search Broom and told him he didn't need a warrant to do so, he had "constitutionally adequate, reasonable grounds" for seizing and searching Broom. The Court of Criminal Appeals of Texas answered, in effect, that Phillips had such grounds as to satisfy requirements of the Fourth and Fourteenth Amendments. The manner in which the court formulated its answer gives rise to several reasons for allowance of the writ.

First, though the seizure and search issue was postured by the

parties as a matter to be resolved primarily by resort to the *Draper-Beck* dichotomy,[2] The Court of Criminal Appeals of Texas restated critical facts in such a way as to avoid that issue,[3] and perforce decided a federal constitutional question of substance in a way probably not – indeed, certainly not – in accord with applicable decisions of this Court such as *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407 (1963)[4] and *Beck v. Ohio,* 379 U.S. 89, 85 S. Ct. 223 (1964).[5] In other words, given the undisputed fact that Spain began his venture upon an unverified report from an anonymous caller whose reliability and credibility are unknown, upholding the search of Broom conflicts with such applicable decisions of this Court.

Second, based upon its version of the facts of the case, The Court of Criminal Appeals of Texas decided a federal

[2]While *Draper v. United States,* 358 U.S. 307, 79 S. Ct. 329 (1959) was not specifically relied on by the State of Texas, *Leal v. State,* 332 S.W. 2d 729 (Cr. App., 1960) – a Draper-type case – was. *Beck v. State of Ohio,* 379 U.S. 89, 85 S. Ct. 223 (1964) was emphatically called to the attention of the court by Broom, along with *Wong Sun v. United States,* 371 U.S. 471, 83 S. Ct. 407 (1963) and other similar decisions.

[3]Although it is clear and uncontroverted, that the report to Spain by Captain Sweeney originated from an anonymous phone call to the latter (see pp. 6-7, supra), the opinion of the Court pretends that Sweeney informed Spain as a *fact* that three hippie-type persons were in the park smoking marijuana (see Appendix A, p. 2a, infra) and thereby avoids facing the problem of reliability and credibility of the unknown caller.

[4]83 S. Ct. 407 at 414: "To hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant" would subvert the fundamental policy of insuring that "the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police. . . ."

[5]85 S. Ct. 223 at 229: "But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informer actually said, and *why the officer thought the information was credible.*"

constitutional question of substance not heretofore determined by this Court. That is, the court determined the issue of "constitutionally adequate, reasonable grounds" for seizing and searching Broom by applying its "regular police radio broadcast" theory to supply those grounds, as shown by cases cited in support of its conclusion that "there was probable cause for the appellant's arrest without a warrant" and – although it is undisputed that search preceded arrest – that "search incident to his arrest was valid."[6] That the issue thus decided by The Court of Criminal Appeals of Texas has not heretofore been determined by this Court, as well as being an important one, is suggested by the grant of certiorari in *Whitely v. Warden*, April 27, 1970, 90 S. Ct. 1505,[7] argued January 13, 1971, as No. 136.[8] While Broom was not the subject of a statewide police radio broadcast, the court apparently thought

[6]The "lead" case is *Jones v. State*, 352 S.W. 2d 270 (Cr. App., 1961); it decided that a search was valid when it followed an arrest that was authorized by what was then Article 215, now 14.04, Code of Criminal Procedure of Texas, providing in effect that a peace officer may, without a warrant, pursue and arrest the accused when it is shown "by satisfactory proof" to him "upon representation of a *credible person*, that a felony has been committed, and the offender is about to escape, so that there is no time to procure a warrant . . .," the arresting officer having "learned the description of the automobile and its occupants from a regular police radio broadcast," 352 S.W. 2d at 271, headnote 4. The cases following *Jones* that are cited in the opinion in support of its conclusion are but variations on the same theme. See, e.g. *Weeks v. State*, 417 S.W. 2d 716 (Cr. App., 1967) cert. denied, 389 U.S. 996, 88 S. Ct. 500 (1967) in which the fact that information disseminated over a regular police radio broadcast originated with a "proven reliable informer" was said to distinguish the case from *Beck v. Ohio*, supra, and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964) in that in the latter the officer "who initiated the chain of events which resulted in the arrest of the accused had only a suspicion."

[7]The question there presented has been stated to be: "Did a statewide police radio broadcast based on a tip received by a sheriff from an unarmed and unidentified informer furnish probable cause for the warrantless arrest of a burglary suspect in the next country?" 7 Cr. L. 4023, Vol. 7 The Criminal Law Reporter No. 5, BNA, April 29, 1970.

[8]An unofficial report of argument in *Whitely*, 8 Cr. L. 4142, indicated similar underlying problems arise in this case.

that the verbal report from Captain Sweeney to Officer Spain, or perhaps from Spain to Llewellyn and Phillips, was sufficiently analogous to a police radio broadcast to supply the probable cause that is said to be found in such broadcasts. Thus just as the "regular police radio broadcast" theory has never been determined by this Court neither has the nicer precise issue of probable cause being supplied by a verbal report from one officer to another officer where the basis of the report is not shown to be reliable and credible.

Third, The Court of Criminal Appeals of Texas, being content to cite cases relying on the "regular police radio broadcast" theory without articulating a rationale for its conclusion of probable cause, has decided a federal constitutional question of substance in a way that its opinion may be taken to formulate a new doctrine of "reasonableness" for a warrantless search of a person; to wit: Probable cause for warrantless search of a person exists when the officer conducting the search confronts an unknown person who is not doing anything unusual at the time, but is with two companions who, in the officer's view, meet a general description given him by another officer, who in turn received a report from still another officer, that three persons generally described were smoking marijuana in the area where the person searched is found.[9] Certainly this is a proposition that has not heretofore been determined by this Court. However, other courts have addressed facets of the question. From, e.g., *Marsh v. United States*, 344 F. 2d 317, 325 (5 Cir., 1965); *Bynum v. United States*, 262 F. 2d 465, 467 (D. C. Cir., 1958); *Williams v. United States*, 308 F. 2d 326, 327 (D. C. Cir., 1962) and *Gatlin v. United States*, 326 F. 2d 666, 668 (D. C. Cir., 1962) and *Gatlin v. United States*, 326 F. 2d 666, 668 (D. C. Cir., 1963) it appears that a hard and fast rule has not yet crystallized.

[9]The proposition is stated in terms of findings by the court that Captain Sweeney informed Spain that "three hippie type persons . . . were smoking marijuana . . ." (Appendix A, infra, p. 1a) rather than in terms of the undisputed fact that Sweeney told Spain he "had received a call" from an anonymous caller to that effect, since the opinion purports to be based on the former rather than the latter.

Thus this case presents an opportunity for this Court to resolve a question that already has a history of some difficulty and, with increasing numbers of police officers and law enforcement agencies and cooperation between them, will continue to be troublesome until finally settled by this Court.

In addition to the manner in which The Court of Criminal Appeals of Texas formulated its determination that seizure and search of Broom satisfied constitutional requirements, importance of the questions presented provides further reasons for granting the writ.

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968) reiterated what had already become axiomatic in search cases:

> ". . . The police must, whenever practicable, obtain advance judicial approval of search through the warrant procedure . . . (and) . . . in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. . . ."

The ruling of the court below stands as a statement of "exigent circumstances" excusing compliance with the warrant requirements of the Constitution. To the end that those requirements are not swallowed up by exceptions devised by lower courts, a decision by this Court on the exceptions said to exist is of utmost importance. Unless corrected by this Court the exception found by The Court of Criminal Appeals of Texas will be applied in future cases to countless numbers of citizens whose dress and appearance resemble what officers perceive as "hippie types."

We know that some peace officers view such types with special distaste and give keen attention to their presence in the community, as chronicled in *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa., 1968), for example.[10] Surely a decision that holds that "hippie-type" is to some extent a sufficient description to warrant peace officers to go abroad in search of persons in a

[10] "It is quite clear from the record in this case that the primary motive for the various arrests and interrogations referred to above was a desire to rid Rittenhouse Square of 'hippies,' or at least those 'hippies' thought to be homosexuals, narcotics-users, or otherwise especially undesirable."

public park who appear to the officers to be "hippie-types" is such a significant harbinger as to evoke concern that a segment of society so labeled may become an easy target of seizure and search as an exception to constitutional warrant requirements.

Moreover readily anticipated ramifications of the "regular police radio broadcast" theory and, even more startling, of the "verbal report" notion embraced in this case, obviously not limited to "hippie-types," underscore importance of review of questions presented here. A search of anyone in a public area meeting a general description given by an anonymous caller of an alleged offender in that area is invited, if not sanctioned, by the opinion in this case. Such prospective invasions of privacy would seem to mandate consideration by this Court lest they fast become realities.

Regarding the question presented concerning prohibitions and penalties of Article 725b, Vernon's Annotated Penal Code, constituting impermissible invasions of privacy with respect to private possession of marijuana, suffice it to say that this federal constitutional question has not been heretofore determined by this Court. Indeed, it was expressly left open in *Stanley v. Georgia,* 394 U.S. 557, 568, 89 S. Ct. 1243, 1249, footnote 11 (1969). The Court of Criminal Appeals of Texas rejected the contention out of hand, pointing to seven prior decisions (Appendix A, infra, p. 3a) – only one of which dealt with the point: *Miller v. State,* 458 S.W. 2d 680 (Cr. App., 1970). In *Miller* the assertion was brushed aside with the simple explanation that the court "did not agree" that authorities cited "can be stretched to encompass" the contention, and reference was made to *Scott v. United States,* 395 F. 2d 619 (D. C. Cir., 1968). *Scott* did not actually rule on the contentions but expressly deferred to "assumptions of rationality which traditionally extend to congressional enactments" in the absence of "information assembled and tested within the framework of the judicial process."

Patently the question is of extreme importance, dealing as it does with one of the most significant phenomenon in contemporary society – especially in the subculture of our

youth. To argue the answer now is not appropriate, but it may not be amiss to suggest that the answer may be just as easily and correctly found in court decisions, statute books, legislative report, learned treatises, scholarly works and similar sources as in information assembled and tested within the judicial process. These sources along with confession of judicial ignorance then prevailing in *Baker v. State*, 58 S.W. 2d 534 (Cr. App., 1933)[11] are, we submit, sufficient to withhold "the deference in terms of assumptions of rationality" traditionally extended to legislative enactments. And given the opportunity by grant of certiorari in this case, a demonstration that private possession and use of marijuana are matters of personal liberty will be vigorously undertaken to the end that in making a significant encroachment on that liberty "the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock*, 361 U.S. 516, 524, 80 S. Ct. 412, 417 (196C).

[11] After stating that marijuana "contains a volatile drug" and "produces a high exhilaration, and when taken in excess, it motivates brutal criminality," The Court of Criminal Appeals of Texas confessed:

> "We have no authentic information touching the drug last mentioned above. No reference to it either in the dictionary or the encyclopedia has been discovered. The foregoing is from a statement in a magazine and the accuracy of the statement is not vouched for by members of the court."

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted and on further hearing on the merits the decision of The Court of Criminal Appeals of Texas in this case should be reversed, the judgment vacated and the case remanded or, alternatively, the prosecution ordered dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sam Houston Clinton, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas has been served on counsel for Appellee by depositing same in the United States mail, postage prepaid, addressed to Robert O. Smith, District Attorney, Travis County Courthouse, Austin, Texas 78701, this day of February, 1971.

Sam Houston Clinton, Jr.

APPENDIX A

APPEAL FROM TRAVIS COUNTY

No. 43,293

CHARLES ALLEN BROOM, *Appellant*

vs.

THE STATE OF TEXAS, *Appellee*

OPINION

Upon a plea of not guilty following a waiver of trial by jury, the appellant was convicted for the possession of a narcotic drug, to wit: Marijuana. The punishment was assessed at six years which was probated.

The appellant contends that the trial court erred in admitting the results of the search of his person in evidence.

The evidence of the state reveals that on February 6, 1969, Sgt. Spain of the narcotic section of the Austin Police Department received a telephone call about 2:55 p.m. from Capt. Sweeney of said department informing him that three hippie-type persons were in Pease Park on the hike and bike trail and that they were smoking marijuana and were located near a sick raccoon. In response to this call, Spain notified Sgts. Llewellyn and Phillips to meet him near Pease Park which they did and he informed them of the information he had just received about the three hippies in Pease Park who were smoking marijuana "at this time." As Spain passed the park going north before he left his car and entered the park, he saw the three hippie-type persons; appellant was standing, and a boy and girl were sitting on the grass. While appellant was standing, he appeared to be dancing as he had his arms extended sideways and was turning around and moving from side-to-side. Sgt. Spain later left his car going north of the location of the three persons in the park and entered the hike and bike trail in Pease Park, and after going a short distance he observed a sick raccoon near where he had been informed that the three hippie-type persons were located. At this time the three hippie-type persons began walking south on the trail on which Llewellyn and Phillips were walking north. Spain approached the three hippies just seconds after Llewellyn and Phillips began talking to them. The appellant was identified at the trial as Charles Allen Broom.

Sgt. Phillips, an officer in the narcotics division, accompanied by Officer Llewellyn, testified that he saw appellant about 3:20 p.m., February 6, in Pease Park walking with a boy, a girl, and a dog. Upon meeting the appellant in the park they told him they were officers and that they had information "he had been or this group had been smoking

marijuana." In searching the appellant he found in his front pants pocket a match box which contained a partially burned cigarette which had marijuana in it. Phillips expressed the opinion that the appellant appeared to be under the influence of a narcotic. He also found some cigarette rolling papers in his left shirt pocket which appeared to be the same type used in the cigarette butt.

Sgt. Phillips had information from Sgt. Spain that there were two hippie-type boys and a girl; and upon observing appellant and his companions he "figured" that they were hippies. There were only three hippie-type persons seen in the park "at that time" by Spain. Before Phillips and Llewellyn located the suspects they received a radio dispatch from Sgt. Spain that he had seen these individuals on the grass in the park across from the Nob Hill Apartments and "they appeared to be under the influence and –"

Phillips and Llewellyn parked their car and began walking north in the park looking for the persons described by Sgt. Spain and they soon saw them abour forty yards away. As Spain arrived, Phillips was searching the appellant and on finding the match box containing marijuana he told appellant he was under arrest for the possession of marijuana.

Sgt. Llewellyn testified substantially as did Sgt. Phillips except that Llewellyn testified without objection that he knew the appellant had been arrested on an indictment charging him with the illegal possession and sale of LSD in 1967.

The record reveals that as Sgt. Spain travelled north on Lamar Boulevard alongside Pease Park to the place where he stopped and entered Pease Park before he started walking south on the hike and bike trail that his police car could have been seen by persons sitting in Pease Park about 3 p.m.

The information received by the officers and the facts and circumstances as shown by the evidence were sufficient for the trial court to conclude there was probable cause for the appellant's arrest without a warrant. The search incident to his arrest was valid. Jones v. State, 352 S.W. 2d 270; Lamar v. State, 415 S.W. 2d 926; Weeks v. State, 417 S.W. 2d 716, cert. den. 389 U.S. 996, 88 S. Ct. 500, 19 L.Ed. 2d 494; Houston v. State, 428 S.W. 2d 352.

In his second, third, and fourth grounds of error the appellant challenges the constitutionality of Art. 725b, V.A.C.C.P., on the grounds that the classification of marijuana as a narcotic drug is arbitrary, unreasonable, irrational and a denial of equal protection of law; that the prohibitions and penalties in Art. 725b, supra, with respect to private possession of marijuana are impermissible invasions of privacy in the

absence of a showing by the state of the compelling interest or reason to abridge such right; and that the six year probated sentence imposed constitutes cruel and unusual punishment for the alleged offense.

In passing on grounds similar to those presented by the appellant, this Court has held Art. 725b, supra, to be constitutional. *Arredondo v. State,* 168 Tex. Cr. R. 110, 324 S.W. 2d 217; *Martinez v. State,* Tex. Cr. App., 373 S.W. 2d 246, cert. denied, 377 U.S. 937, 84 S.Ct. 1345, 12 L.Ed. 2d 301; *Segura v. State,* Tex. Cr. App., 427 S.W. 2d 864; *Locke v. State,* 168 Tex. Cr. R. 507, 329 S.W. 2d 873; *Rey[illegible] v. State,* Tex. Cr. App., 434 S.W. 2d 362; *Johnson v. State,* 447 S.W. 2d 927; *Miller v. State,* No. 43,085, 458 S.W. 2d 680.

The appellant's grounds of error are overruled.

The judgment is affirmed.

Belcher, Judge

(Delivered December 9, 1970)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

* * *

NO. 1406

* * *

CHARLES ALLAN BROOM,
Petitioner

v.

STATE OF TEXAS,
Respondent

* * *

On Petition for Writ of Certiorari to
The Court of Criminal Appeals of Texas

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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* * *

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is sought to be reviewed in this proceeding, is as yet unreported. The opinion is, however, appended to the Petition herein.

JURISDICTION

The formal jurisdictional requirements would appear to be satisfied in this case although Respondent disputes that any right guaranteed by the Constitution of the United States has been denied.

QUESTIONS PRESENTED

1. Was the warrantless arrest and search of Peti-

tioner unreasonable under the Fourth and Fourteenth Amendments to the United States Constitution where:

(a) The police officers had information from an anonymous informant that three hippie-type individuals were smoking marijuana at a particular place in a public park, and

(b) Police investigation disclosed the three hippie-types at the place in the park indicated and

(c) One of the persons (the Petitioner) was observed doing a dance with arms waving, prior to the arrest and subsequent search which disclosed marijuana in the possession of Petitioner?

2. Whether the State of Texas can constitutionally make criminal the private possession of marijuana?

STATEMENT OF THE CASE

Austin police officers received information by telephone that three hippie-type persons, two boys and a girl, were smoking marijuana in Pease Park on the hike and bike trail across from the Nob Hill Apartments. The information came from an unknown informant.

Three police officers investigated and saw three hippie-type, two men and a woman, in the Park on the trail at the place indicated. Two of the hippies were seated and Petitioner was dancing with arms extended, turning around and moving from side-to-side. One of the officers recognized Petitioner as a person arrested in 1967 on an indictment charging the illegal possession and the sale of LSD.

Acting on this confirmation of the information received, the officers arrested Petitioner and searched him finding a match box containing marijuana.

Petitioner was tried on a plea of not guilty before the trial court, found guilty and assessed a term of six years.

The judgment was affirmed by the Court of Criminal Appeals of Texas and these certiorari proceedings followed.

ARGUMENT AND AUTHORITIES

1. *The Arrest of Petitioner and the Search and Seizure Was Proper Under the Holding of this Court in Draper v. United States*

In *Draper v. United States,* 358 U.S. 307 (1959), a federal narcotics agent was told by an informant, who had in the past proved to be reliable, that Draper was selling narcotics. The agent was later informed that Draper had to go to Chicago to purchase heroin and would return by train on the morning of September 8th or 9th with the heroin. A description of Draper and his clothing was also given by the informant. A man, bearing the description given and wearing the clothes described, alighted from the train on the morning of September 9th carrying a zipper bag. He was arrested and the insuing search revealed that he was carrying heroin. This Court found that there was probable cause for the arrest and that the search was reasonable under the circumstances.

In the present case, the Austin police were told that three hippe-types were smoking marijuana in Pease Park. On going to the park, the police observed the three hippies and noted that Petitioner Broom was dancing around, an indication that he was under the influence of marijuana. One of the officers recognized Broom to be a person arrested for possession and sale of LSD in 1967 (the instant arrest occurred on February 6, 1969). As before noted, the search in the present

case revealed that Petitioner had marijuana in a match box.

The search here would appear to be reasonable under the doctrine announced by *Draper*. While in the present case the informant and his reliabality was not known (as opposed to the situation in Draper), the information furnished here was at least one factor upon which probable cause could be predicated. The subsequent police investigation disclosed the reliability of the information received. The police

(1). Found the three hippie-types at the location described.

(2). Petitioner's actions were consistent with one under the influence of marijuana, leading to the rather definite belief that he had recently been smoking the drug, and

(3). Petitioner was known to have been arrested earlier for the sale and possession of LSD, thus re-enforcing the belief that he was a person more likely to use marijuana than a person never involved with LSD.

In light of the foregoing circumstances, the arrest and search and seizure were reasonable under the United States Constitution. Although the informant's reliability was unknown here in contract with *Draper,* the verification of the informant's information in the instant case was stronger and more substantial. In addition to locating the persons described at the correct location (which was as far as the verification went in *Draper*), the officers in the present situation also verified to a large degree that Petitioner had, in fact been smoking marijuana because of his observed actions and because of his previous connection with LSD.

Accordingly, under the authority of *Draper,* the seizure of marijuana from Petitioner should be upheld as the product of a reasonable search.

2. *There Is No Constitutional Bar To A State's Forbidding The Private Possession of Marijuana*

The legislative branch of both the state and federal governments have wide latitude in defining what activity should be classified as criminal. 21 Am.Jur. 2d 95.

However, Petitioner, argues that, in the case of private possession of marijuana, the State is without the power to punish except through a showing of a compelling state interest.

This contention is without efficacy and was answered by this Court in *Stanley v. Georgia,* 394 U.S. 557 (1969), wherein it was observed at page 394, footnote 11,

> "What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as *narcotics,* firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. *No First Amendment rights are involved in most statutes making mere possession criminal.* (Emphasis supplied)."

There is, thusly, no merit in the contention that prohibiting the possession of marijuana violates any constitutional right.

CONCLUSION

For the reasons advanced above, Respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Lonny F. Zwiener, Assistant Attorney General of Texas, attorney for Respondent, certify that a copy of the above and foregoing Respondent's Brief in Opposition has been served on Petitioner by placing same in the United States Mail, postage prepaid, to Petitioner's attorney, Mr. Sam Houston Clinton, 205 Texas AFL-CIO Bldg., Austin, Texas 78701, this the ____ day of April, 1971.

LONNY F. ZWIENER
Assistant Attorney General

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1406

CHARLES ALLAN BROOM,

Petitioner

v.

STATE OF TEXAS,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY TO BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
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ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY TO BRIEF IN OPPOSITION

Petitioner CHARLES ALLAN BROOM, under authority of Rule 24, paragraphs 4 and 5, submits this reply to arguments first raised in Respondent's Brief in Opposition and to call attention to a decision of this Court rendered since Petition was filed.

NEW ARGUMENTS

Through her Attorney General the State of Texas has abandoned primary fact findings and legal conclusions in the opinion of The Court of Criminal Appeals of Texas (now reported at 463 S.W. 2d 220; Appendix A, Petition for Writ of

Certiorari). Recasting the principal question presented by Petitioner, Respondent undertakes to develop a theory – one not embraced in that opinion – to sustain the judgment below. Now acknowledging, as opinion of the Court of Criminal Appeals did not, that Sergeant Spain began his venture upon an unverified report *from an anonymous caller*[1] whose reliability and credibility were unknown, Respondent argues that seizure and search of Petitioner should be upheld under authority of *Draper v. United States*, 358 U.S. 307, 79 S. Ct. 329 (1959) – candidly recognizing, however, that the informer in *Draper*, a "special employee" of the Bureau of Narcotics, had proven the reliability of his information in the past, Brief, pp. 4-5.

In attempting to stretch *Draper* to fit this case, Respondent asserts that here "subsequent police investigation disclosed the reliability of the information received," Brief, p. 4. But to bolster its new theory, Respondent paints over true factual details with broad strokes of three deceptive conclusions stated in Brief, p. 4. Close reading of the record demonstrates how actual facts are hidden by those specious conclusions.

(1) Sergeant Spain was told the anonymous caller had claimed "there were three hippie-type individuals" in the park; neither the sex nor other description of the three "hippie-types" was stated. Yet, converting that ambiguous report into information that "three hippie-type persons, *two boys and a girl,*" Respondent would have it that officers found "*the* three hippie-types" when they came across Petitioner and his companions. Among other considerations, no account is taken of the span of time from the initial anonymous report to the confrontations.

(2) After Spain rendezvoused with Sergeants Llewellyn and Phillips, he separated from them and drove alone north on Lamar Boulevard. In the park he observed three persons he deemed "hippie-types:" a boy and a girl sitting on the grass and a boy "dancing" – "He had his arms extended sideways and

[1] All emphasis is supplied throughout by the writer of this reply unless otherwise indicated.

was turning around and moving from side-to-side." A small dog was with them. Petitioner was thus cavorting in a public park in the middle of an afternoon of "the first beautiful day . . . in about two weeks" on the occasion of a small picnic with friends while around them Spain also observed other males running and jogging in sweatshirts and gym shorts and couples walking along the hike and bike trail. Spain did not see Petitioner or his companion smoking anything. While Spain was neither asked for nor expressed any opinion about his observations, Respondent translates them into "an indication that he (Petitioner) was under the influence of marijuana," Brief, p. 3, and conjectures that "Petitioner's actions were consistent with one under the influence of marijuana, leading to the rather definite belief that he had recently been smoking the drug," Brief, p. 4. Of course, observations by Spain are not observations by Llewellyn or Phillips,[2] the latter officer actually seizing and searching Petitioner outside the presence of Spain.

(3) Spain was not asked whether and did not claim that he recognized Petitioner from any prior occasion. Phillips, who accosted, seized and searched Petitioner, testified unequivocally:

"Q At the time you observed Broom and before you searched him, did you recognize him as any person you had known before?

A No, I didn't know him.

Q Did you recognize him in any way?

A No."

Llewellyn agreed to a leading question to the effect that he did recognize Petitioner "as being handled in your department before." But there is no showing that Llewellyn imparted his

[2] Both Phillips and Llewellyn conceded that from the time they first saw Petitioner and his companions walking toward them as they traversed the initial thirty to forty yards between them Petitioner and his companions were "just walking" and Petitioner "was not doing anything unusual."

hazy "recognition" to Phillips before Phillips searched Petitioner.[3] Moreover, whatever vague recognition flashed to Llewellyn that afternoon did not include almost two-year old details and his recollection of them was later refreshed by reviewing "the transcript of Mr. Broom's prior case last week or the day he was arrested." Thus, befor his confrontation with Phillips, Petitioner was *not,* as Respondent now contends, "known to have been arrested earlier for the sale and possession of LSD. . . ." Brief, p. 4, by either Phillips or Llewellyn.

So it is that actual facts of the matter belie conclusions now drawn by Respondent. They certainly do not show, as Respondent contends, that officers "verified . . . Petitioner had, *in fact* been smoking marijuana because of his observed actions and because of his previous connection with LSD," Brief, p. 4.

NEW DECISION

Whiteley v. Warden, No. 136, just decided March 29, 1971, while perhaps not controlling because there, unlike here, that a criminal offense had been committed was a certainty,[4] is instructive enough to warrant consideration in resolving the search issue here. Its teachings, we submit, reject contentions made by Respondent in this cause.

[3]Indeed, the record affirmatively demonstrates that even if Llewellyn did recognize Petitioner he did *not* inform Phillips:

"Q And as you and Sergeant Phillips, on foot, approached them on the hike and bike trail, neither you nor he said anything to one another about the people you were looking for or what they might be doing or that those were the people or anthing, did you?

A If I recall correctly, as we saw the three people walking toward us, we remarked to each other that these were probably the people we were looking for . . .

Q Who remarked to whom that these were probably the three people?

A It could have been me. It could have been Sergeant Phillips. I don't recall."

[4]Also, in *Draper,* unlike here, probable cause to believe that an offense was being committed originated from a report of a reliable and credible informer; here an anonymous caller provides no reasonable basis for believing even that an offense had been or was being committed.

When the Court applied those standards a court "would employ in reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant," the essence of its itemization of "information possessior" by the arresting officer is that a burglary had been committed and that the car and its occupants stopped by him matched or fitted the detailed description given in State Bulletin 881, requesting that persons named by "P and H." Then the Court concluded that "the very most the additional information tended to establish" was that the originator of the initial information knew the occupants and the kind of car they drove. In other words, the arresting officer's knowledge and observations merely confirmed descriptions specifically given in the bulletin. Here Phillips had no information of greater significance.[5]

CONCLUSION

Now that Respondent has restructured its position, the true facts in the record appear to make *Beck v. Ohio*, 379 U.S. 890, 85 S. Ct. 223 (1964) so dispositive of the search issue as to warrant summary grant of the writ and reversal of judgment of conviction.

On the other hand, since the theory adopted by Respondent and urged upon the Court has really never been ruled by The Court of Criminal Appeals of Texas in this cause, to grant the writ, vacate the judgment and remand for further consideration

[5] Even if knowledge of the innocent act of "dancing" is credited to Phillips no help is derived. Cf. *Garcia v. Nelson*, F. Supp. , 7 Cr. L. 2327 (N. D. Calif., 1970):

> "The jumping into the air and shuffling of Garcia, described as a 'little dance,' is not an act which can in any way be reasonably said to relate to criminal ctivity."

Garcia performed in a public bar; Petitioner in a public park.

in the light of that new theory and *Whiteley* seems to be an appropriate alternative approach.

Failing either, for reasons stated in original petition and upon contentions in this reply, Petition for Writ of Certiorari should be granted for hearing on merits and further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sam Houston Clinton, Jr., attorney for Petitioner, certify that a copy of the above and foregoing Reply to Brief in Opposition has been served on Respondent by placing same in the United States mail, postage prepaid, to Respondent's attorney, Lonny F. Zwiener, Assistant Attorney General, Box 12548, Capitol Station, Austin, Texas 78711 this day of April, 1971.

Sam Houston Clinton, Jr.